AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers/Presidential Power to Execute the Law

*William French Smith*, **The Attorney General’s Duty to Defend the Constitutionality of Statutes** (1981)

*Shortly after being confirmed as President Ronald Reagan’s first attorney general, William French Smith was asked by the chair and ranking member of the Senate Judiciary Committee about a bit of old business. Smith’s predecessor, Benjamin Civiletti, had informed the committee the previous year that the Department of Justice would not defend in court the constitutionality of a provision of the Public Broadcasting Act of 1967. The provision barred noncommercial television licensees from editorializing or endorsing candidates for office. The Senate was not happy with Civiletti’s decision to allow the constitutionality of a federal statute be litigated in court without a defense from the federal government. Smith informed the Judiciary Committee that he would be reversing course and would petition the courts to allow another hearing so that the government could present a defense. Ultimately, the provision was struck down by the Supreme Court, Smith laid out the position that the Department of Justice had a duty to defend federal statutes “whenever a reasonable argument can be made in its support.”*

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The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitu­tional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.

The prior decision not to defend § 399(a) was made by virtue of the conclusion that no reasonable defense of the constitutionality of this provision as a whole could be made. Under applicable Supreme Court precedent, however, even a statute that could have some impermissible applications will not be declared unconstitutional as a whole unless the provision is substantially overbroad and no limiting construction of the language of the statute is possible. Here, for example, the statute’s application to political endorsements by government-owned broadcast­ers might well be held by a court to be constitutional. In that event, the fact that the statute permissibly could be applied in some instances may be sufficient to preclude a finding that the provision as a whole is unconstitutional.

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